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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 696

ALPHA ENTERPRISES, INC., *Petitioner*

v.

CITY OF HOUSTON, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Your Petitioner, ALPHA ENTERPRISES, INC., respectfully petitions for rehearing as follows:

Petitioner, ALPHA ENTERPRISES, INC., asks that the Court grant rehearing of its order of December 11, 1967 denying their petition for a Writ of Certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

ALPHA ENTERPRISES, INC., approximately fourteen (14) years ago purchased land outside of the city limits of Houston and constructed certain improvements on said land to be used for the operation of a wholesale

fireworks business, engaged in both interstate and intrastate commerce. For approximately fourteen (14) years said land has been used by said Plaintiffs for such purpose. The fireworks normally and presently stored on Petitioner's premises are ICC Class C Common Fireworks as defined by Article 1725 of the Penal Code of Texas, and under the law of the State of Texas are allowed to be sold through retail sales between the twenty-fourth day of June and the fourth day of July each year, and between the fifteenth day of December and midnight of the first day of January of the following year. Since February 1, 1958, the effective date of the first statute regulating fireworks in Texas, fireworks in the State of Texas have been regulated by state statute, and Petitioners have operated said business under said licensing law at its location at 12514 Gulf Freeway, Houston, Texas. Since said fireworks business has been a registered business by the State of Texas, Petitioners have secured a license from the State for the purpose of operating their business each year. The business of Petitioner is not only that of intrastate, but part of same also involve shipments in interstate commerce, in that shipments arrive at Petitioner's business location from other states and from foreign countries, are temporarily placed in the business location of the Petitioner and then forwarded in interstate commerce to the other states in the Southwest, the packages of said fireworks being unbroken during the time they are in the possession of the Petitioner, and before leaving for other states. The Petitioners have complied with all of the laws of the State of Texas and of the laws of the United States governing the shipment of fireworks in interstate commerce. The Petitioners have invested a great sum of money in purchasing the property from which

they operate and in constructing the various improvements located thereon, and said improvements and property are of such a nature that any other use of same other than for the storage and sale, by wholesale, of Class C Common, Class A, and Class B fireworks would be impracticable.

At the time Petitioners purchased the property from which they operate, said property was located on the Gulf Freeway and was approximately seven miles outside of the jurisdictional limits of the City of Houston, Texas. Sometime during the latter part of the year 1965, the City Council of the City of Houston passed an ordinance under the terms of which the property involved herein was annexed and made a part of the City of Houston. However, the property located immediately to the rear of and adjoining Petitioner's property was not annexed under such ordinance, and is still located in the County outside of the Houston City Limits and not subject to the ordinance herein complained of. The City of Houston, Texas has threatened to seize and destroy all fireworks presently in possession of Petitioners at their business location. Such threats are based on Section 15-66 of Article IV of the Code of Ordinances of the City of Houston providing as follows:

> "Sec. 15-66. Enforcement-Declaration of nuisance, seizure of articles, injunction, right of entry of officers.
>
> The presence of any fireworks within the jurisdiction of the city in violation of this article is hereby declared to be a common and public nuisance. The fire marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this article

and any member of the fire prevention division of the fire department of the city or any police officer of the city or any other duly constituted peace officer is empowered to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the fire marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section. Notwithstanding any penal provision of this article, the city attorney is authorized to file suit on behalf of the city or the fire marshal or both for injunctive relief as may be necessary to prevent unlawful storage, transportation, keeping or use of fireworks within the jurisdiction of the city and to aid the fire marshal in the discharge of his duties and to particularly prevent any person from interfering with the seizure and destruction of such fireworks; but it shall not be necessary to obtain any such injunction relief as a prerequisite to such seizure and destruction. The fire mashal or any member of the fire prevention division of the fire department is hereby authorized to enter any building where the unlawful presence of fireworks is suspected in order to inspect the same for the presence of such fireworks.".

It is perfectly obvious from reading said Ordinance that same is so broad that it does interfere with interstate commerce, and because of such fact is unconstitltional. That for approximately thirteen (13) years Petitioners operated from the business location on the Gulf Freeway without being interfered with by the City of Houston, Texas and they were not bothered in any way until after the Annexation Ordinance above mentioned was passed. In other words, for approximately thirteen (13) years Petitioner operated a legal business and for the last

eight (8) years one licensed by the State of Texas and suddenly, because of the Annexation Ordinance, they were no longer operating a legal business, but same overnight became illegal. Petitioner says that the mere presence of fireworks is not a danger to persons or property and could not be a nuisance, and that the City of Houston, Texas has no legal right to declare that to be a nuisance which is not a nuisance, in fact Petitioner's business is one licensed by the State of Texas, and yet the City of Houston, Texas in total disregard of Petitioner's property rights have threatened to and will seize and confiscate Petitioner's property without payment therefor, unless restrained from so doing by this Honorable Court, even though such confiscation would be of property in interstate commerce.

This Writ of Certiorari is sought for the purpose of declaring the ordinance above set out prohibiting the mere presence of fireworks within the City a nuisance to be unconstitutional because it prohibits a legal business licensed by the State from operating, is not merely regulatory but actually confiscatory, provides for the taking of property without due process of law, and attempts to prohibit a business engaged in interstate commerce. This Writ is also sought for the purpose of enjoining the City of Houston, the Fire Marshal, and Fire Chief and other employees and servants of the City from seizing and confiscating the fireworks belonging to Petitioner. The use made by Plaintiffs of the property in question for approximately fourteen (14) years is a valid use and it is unfair and unreasonable for the City of Houston, Texas to come out and annex Petitioner's property and then declare Petitioner's business to be illegal and a nuisance. At the time Petitioners purchased their property in 1953,

well beyond the jurisdictional limits of the City of Houston the confiscatory ordinance in question did not apply to them and now fourteen (14) years later the City of Houston says that the fourteen (14) year old ordinance now applies to their property even though they are located at the same place and doing the same kind of business for the entire fourteen (14) years. That Respondents furthermore are violating the Fourteenth Amendment of the Constitution of the United States in that said Respondents are in effect taking the real property of Petitioner, without compensating them, in that they are restricting the use of said property from that which Petitioners have received a license to operate from the State of Texas and thereby are limiting the uses to which said property may be put. By reason of the threatened action of the City of Houston Petitioners have suffered and will continue to suffer great immediate and irreparable loss, injury and damage for which Petitioners have no adequate remedy at law unless this Honorable Court grants a Writ of Certiorari to review this case in its entirety.

The opinion of the Court below neglected to discuss or answer the contention of the Petitioner that Article IV, Section 15-66, Code of Ordinances of the City of Houston imposed a restriction upon products received and shipped by the Petitioner in interstate commerce. All of the facts in this case reveal that the Petitioner has been receiving and shipping in interstate commerce for fourteen years the same commodity which the Ordinance of the City of Houston now declares a common and public nuisance. During all of the time that the property was shipped and received in interstate commerce they were never the object of confiscation or abatement as a

nuisance by the Respondents, City of Houston. There is no limitation or restriction in the "Nuisance Ordinance" put into effect by the Respondents, City of Houston, which exempt these products from being destroyed while in interstate commerce shipment.

The only answer of the Respondents, City of Houston, attempting to justify their ordinance has been that it was enacted in 1953 after an explosion in the City of Houston. Such fact has no relationship to the present existing state law of the State of Texas which authorizes the Petitioner to engage in the sale and storage of fireworks within the State of Texas. The application of the Ordinance was questionable at the time it was passed in 1953, as being unconstitutional, and is even more so after the State of Texas enacted statutory laws authorizing the sale and storage of fireworks within the State of Texas in 1958. Products which are regulated, inspected and authorized by the State of Texas cannot be a nuisance by their mere presence anywhere. Yet, the Ordinance complained of by the Petitioner declares the mere presence of fireworks within the City of Houston a common and public nuisance. The use, condition, or location is not made a basis of their being a common and public nuisance. There is nothing in the Ordinance to prevent the Police Department of the City of Houston from summarily confiscating and destroying fireworks in shipment as they pass through or into the territorial limits of the City of Houston. Such Ordinance clearly violates the commerce clause of the Constitution which guarantees citizens of the United States the right of movement in regular course of their products.

The Respondents have not cited one single case wherein the Court has upheld an ordinance or statute which

declares a product to be a common and public nuisance where such product is licensed, regulated and inspected by the State through its legislative enactments. Nor can such case be found.

Respondents cite *Pierce Oil Corporation v. City of Hope,* 248 U.S. 498 (1919) as being authority for upholding their contention. Such case falls far short of authorizing the summary confiscation of any product, but merely prohibits the storage of gasoline within three hundred (300) feet of any dwelling house. The object of the Petitioner is not to complain of storage of its products at a regulated distance but to prevent confiscation of such products in interstate commerce for shipment.

All of the other Texas cases cited in Respondents' reply brief were cases that were decided by the Texas Courts prior to the passage of legislation by the State Legislature in 1958 authorizing the sale and storage of fireworks within the State of Texas and are no longer applicable after the legislative authorization for fireworks within the State.

It must be kept in mind that the same ordinance provision was declared unconstitutional in *City of Fort Worth v. Atlas Enterprises,* 311 S.W.2d 922 (Fort Worth Court of Civil Appeals, 1958) wherein the Court said:

> "Furthermore, since the ordinance discriminates against interstate commerce, will impede its movement in regular course, and will affect it directly, it is in conflict with the commerce clause of the United States Constitution, art. 1, Section 8, cl. 3 Title 18 U.S.C.A., Ch. 39, Section 835. exhibits congressional delegation of authority to the Interstate Commerce Commission to regulate and control

the transportation within the limits of the United States of explosives and combustibles. Fireworks are of this character. Regulations of the Interstate Commerce Commission have been promulgated pursuant to authority so conferred. The regulations are before us."

Petitioner again submits that it was entitled to have the Court below pass on its constitutional question involving the undue burden and restriction placed on interstate commerce by this "nuisance ordinance" of the City of Houston, Texas. This, the Court below failed to do, and instead, choose to ignore completely the existence of this important question. If there is any doubt in the minds of this Court whether there might be a reasonable basis for the decision of the Court of Civil Appeals, we submit that the Supreme Court can and should vacate the decision below for further proceedings and the clarification of its decision. *Minnesota v. National Tea Company*, 309 U.S. 551. The Petitioner requests nothing more than that the Court of Civil Appeals tell us that this ordinance does or does not violate the constitutional provisions governing interstate commerce.

CONCLUSION

For the reasons set forth above and in its original petition for Certiorari, Petitioner respectfully moves for rehearing, and for the grant of Certiorari.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of the Supreme Court.

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Attorneys for Petitioner